IN THE CIRCUIT COURT OF PAGE COUNTY.

IN THE MATTER OF THE CONTEST OF THE LOCAL OPTION ELECTION HELD AT SHENANDOAH, VA., DEC. 9, 1913.

1. Elections—Local Option Elections.—The code provision relating to general elections, which requires that a line be drawn three-fourths of the way through the names of the candidates the voter does not wish to vote for, does not apply to the marking of ballots in a local option election. While the sentence against which the voter desires to vote must be scratched, this may be done in any way that clearly shows the intention of the voter to scratch it.

2. Statutes—Construction.—It is a rule for the construction of statutes that the spirit as well as the letter must be represented, and when the context shows clearly a particular intent in the legislature to effect a certain purpose, some degree of implication may be called to aid the intent. There is, however, always danger in giving effect to what is called equity in a statute; it is much safer and better to rely on and abide by the plain words, although the legislature might have provided for other cases had their attention been directed to them.

3. Elections—Local Option Elections—Signatures to Petition.—It is a valid objection to a petition of contest in a local option election case that the signatures of electors thereto were signed by attorney and not in person, and the persons whose names so appear will not be considered parties to the petition.

4. Courts—Vacation.—Local option election contest cases, which are by statute triable by the court in term, should not be disposed of by a decision of the judge acting in vacation by consent of the formal parties to the proceedings; but where the question is one wholly of law the court will announce its decision thereon.

D. O. Dechert and *Jas. B. Stevenson,* for contestants.
Geo. N. Conrad and *M. L. Walton,* for defendants.

OPINION.

T. N. HAAS, JUDGE: This matter now comes up to be heard on a demurrer to the petition of the contestants. The principal question to be decided on the demurrer (as agreed by counsel, modifying in some particulars the case as presented in the language of the petition) is whether the voter in a local option election is required, in order to cast a valid ballot, to erase the sentence which does not express his choice by drawing a line through at least three fourths of the length of the sentence, the contention being made on behalf of contestants that this is essential. This contention is not rested on any express provision to that effect in the local option law, constituting chapter 25 of the Code, but

upon Sec. 122h of the Code, forming part of Chap. 10 of the Code, which, it is claimed, applies to and governs local option as well as general elections held for the purpose of choosing persons to office.

It is stated in 15 Cyc., at page 363, that "general election laws which prescribe the form of ballots and the method of conducting elections for State and County officers, and members of Congress, are in the nature of things not applicable to town meetings, neither do they as a rule apply to *special local elections to vote on propositions,* nor are they applicable to municipal elections held under special charters." In support of this text, decisions are cited from eleven States. I have had access to only one of these, the case of Pritchard *v.* Magoun, 46 L. R. A. (Iowa) 381, and this case supports the text quoted, the election in question there being on a proposed bond issue, and the contention being that it should have been held under the Australian ballot law governing general elections. If the law is correctly stated in these authorities to the effect that general election laws prescribing the form of ballots and the method of conducting elections do not, in the absence of provisions to that effect, apply to special elections to vote on propositions, it is also true, and for stronger reasons, that provisions in such general laws directing how ballots shall be marked in voting, would not apply to the marking of ballots in elections on propositions. Our own Court of Appeals, I find, in the case of Willis *v.* Kalmbach, 109 Va. 474, has approved the principle or rule just quoted from Cyc., citing in the opinion the Iowa case above mentioned and a number of others to the same effect. In Willis *v.* Kalmbach, the constitutionality of the Act of the General Assembly of 1908 known as the Ward law, relating to the qualifications of voters in special and local option elections, was assailed on the ground that it changed the qualifications for voting from those prescribed by the Constitution, in that it made persons qualified to vote in local option elections who had not paid their capitation taxes six months or more before the election was held. The constitutional provisions involved were Article Two, section 18 of the constitution, proper, which prescribes the qualifications for voters "for members of the general assembly and all officers elective by the people," and sec. 18 of the Schedule to the Constitution which says: "In all elections held after this constitution goes into effect, the qualifications of electors shall be those required by Article II of this Constitution."

Notwithstanding the fact that Article II, § 18, of the Constitution, is the only part of that instrument that prescribes qualifications of voters, and notwithstanding the comprehensive words of § 18 of the Schedule, the court held that local option elections were not embraced in the scope or intent of either, and that in

local option elections the qualifications prescribed in Article II, were not essential. The President of the Court, who delivered the decision, referred to a South Carolina case (Birchmore *v.* State Board Commissioners) reported in 14 L. R. A. (N. S.) 850, where the holding is to the contrary, and quoted with approval the adverse criticism of that decision made in the notes to that report, where it is said that the position of the Court, in that case, that the phrase "all elections," as used in the Constitution, was sufficiently broad to include not only elections for the selection of officers, but also elections to determine any particular or special question which might be submitted to the electors, "seems to be contrary to the weight of authority, as the general rule appears to be that the words 'election' or 'all elections' imply merely elections for the selection of officers, and that elections for the decision of some stated proposition need not be conducted under the formal and prescribed rules for elections for the selection of officers."

It follows plainly from these citations that the provisions governing general elections do not apply of their own vigor to local option elections, and that in local option elections a vote cannot be rejected because the voter did not run a line three fourths of the way through the sentence, unless there is some other enactment in the statutes to that effect—either in Chapter 10, where § 122h is found, or in Chapter 25, relating to local option elections. Let us look to the statutes. Chapter 10 of the Code represents a single act of the General Assembly which was approved Jan. 11, 1904 (Acts, 1902-3-4, p. 922). The title of the act (as also of the chapter as it appeared in the Code of 1887) is "An Act to amend and reenact Chapter 10, of the Code of Virginia in reference to general and special elections; when and where held; regulations for their conduct and government; compensation of services in election." It relates to general and special elections. General elections are defined by the first paragraph of the act (§ 109, of the Code). Special elections are defined in the second paragraph of the act (§ 110, of the Code) to be such as are held in pursuance of a special law and also such as are held to supply vacancies in any office. A local option election, therefore, is not a special election within the meaning of that act, for local option elections are held under a general law—not under a special law. It might be questioned, therefore, whether § 146, Ch. 10, hereafter to be considered, is, so far as it relates to local option elections, within the description of the act contained in the title and constitutional. But I will pass that question by, and, indeed, the objection if good would be cured in large part if not entirely by a provision of § 581, in the local option law. Many of the provisions of Chapter 10, are wholly inap-

plicable in their nature to local option elections, and to other referendum elections as well, being manifestly applicable only to elections for choosing officers. The only provision in the whole chapter (Chapter 10) by which the act or any part of it is made applicable to local option elections is § 146. That section provides that "all special elections, all local option elections and all elections to fill vacancies in office, shall be superintended and held, notice thereof given, returns made and certified, votes canvassed, results ascertained and made known, and commissions and certificates of election given, by the same officers, under the same penalties, and subject to the same regulations as prescribed for general elections, except so far as may be otherwise provided."

The things here specified relate almost if not quite exclusively to the conduct and management of the election, as it is devolved upon the election officers, ascertaining the result and certifying the returns, etc., and it is provided that they shall be done by the same officers, under the same penalties, and subject to the same regulations as prescribed for general elections. There is nothing in that section about the method of voting, or making mandatory upon the voter, in the marking of his ballot, provisions of another section of the same chapter governing the method of voting in elections of officers.

The next provision referring to the general law as applicable to local option elections is found in Code, § 581, Ch. 25, relating to local option elections. After providing that a special election on the question of license shall be ordered on the petition of one fourth of the voters, and making some other directions, this section says: "Said special election shall be held and conducted as other special elections are held and conducted." What has been said as to § 146 applies to this section, which is in large part a repetition in the local option law of the substance of § 146.

Coming to Code, § 582, in the local option chapter, the last section which is claimed to have any bearing on the question, we find it provides that "the manner of receiving and canvassing the ballots, and making returns and abstracts thereof, shall conform in all respects to the requirements of the general election law, except that the certificate of the judges shall be as follows," following with the form of the certificate. This merely completes in the local option statute the repetition of the specifications made in section 146, and is even more remote from the subject of the marking of his ballot by the voter than either section 581 or 146.

The marking of the ballot by the voter, under the general election law, is dealt with in § 122h under the title "Method of Voting," and the subjects mentioned in the specifications in §§ 146,

581 and 582, as to which it is provided the general law shall govern, are wholly separate and distinct and of different character, and they are dealt with in Chapter 10 under separate and distinct headings.

The things referred to in §§ 146, 581 and 582 relate wholly to the holding and conducting of the election and the ascertaining and making return of the result and issuing certificates and commissions, while § 122h relates exclusively to the marking and casting of the ballot by the voter. Indeed, when the local option law was first enacted in 1886, and the provisions of §§ 581 and 582 as they now exist were put into that law, the general election law did not prescribe any method of marking ballots, and it was not necessary to do any marking, because each party or set of candidates had its own ballot (the character of it being prescribed by law), printed and handled under their own management, and the names of opposing candidates did not appear on it at all. And in local option elections two ballots were printed, one to use in voting for and the other for use in voting against license, and the voter could choose between them. When the general election law was changed to embody features of the Australian System, in 1894, the single ballot, officially printed and to be given into the hands of voters as they applied to vote, was adopted; and since that time the local option ballot has also been in the form of a single ballot, with both sentences on it, officially printed and given into the hands of the voter when he appears to vote, the practice in local option elections being conformed in these particulars to the provisions of the new law, because these things—the use of an official ballot and the duties of the officers with reference to it, to printing it and giving it out—pertain directly to the manner of holding and conducting elections and therefore fall under the influence of the general provisions of §§ 146 and 581 as to how local option elections shall be held and conducted.

If, however, to go further and consider another aspect of the question, it could be held that §§ 146, 581 or 582, any or all of them, should be interpreted as adopting the provisions of the general election law to govern local option elections in all respects where they are in their nature and substance applicable, and it is not otherwise provided in the local option law, it would remain to determine whether the provisions of § 122h are in the nature of things applicable to the ballot prescribed by the local option law, and, if applicable, how they are to be applied. The local option law says:

"The ballots to be used in said election shall be respectively, as follows: For licensing the sale of intoxicating liquors, and against licensing the sale of intoxicating liquors."

The gramm tical import of this language is that there should be two ballots provided, one containing the words "For licensing the sale of intoxicating liquors," and the other the words "Against licensing the sale of intoxicating liquors." In that case there would be nothing to scratch at all in casting a vote, but the voter would use one ballot or the other, according to his choice. And originally that was the practice as already indicated. It is now a single ballot, however, with both sentences printed on it, one of which must be scratched in order to express the voter's choice by the remaining one, and in this form we are to consider the applicability to it of the provisions of § 122h, in form and substance. That section, which it is claimed must be held to apply to this ballot, and to be mandatory in local option elections as well as in general elections, with the effect of invalidating the ballot if not complied with, is as follows:

The elector "shall then draw a line with a pen or pencil through the names of the candidates he does not wish to vote for, leaving the title of the office and the name or names of the candidates he does wish to vote for unscratched. No name shall be considered scratched unless the pen or pencil mark extends through three fourths of the length of said name."

It is obvious, of course, that this language can apply only to ballots used in elections where persons are chosen to office, and that it has no application whatever to the local option ballot. But it is contended that the Court, under the influence of §§ 146, 581, and 582, should apply this statute, *mutatis mutandis*, by some principle of change and adaptation, to the ballots used in local option elections, to which it does not in terms relate in even the remotest manner, and in doing so should regard the whole of the sentence on the local option ballot as the equivalent of the name on the ballot used in general elections for officers, and as such to be scratched by a line extending three-fourths of the way through the sentence. No such intent is manifest in the statutes, and it is not the province of the Court, by means of strained constructions and remote inferences, to import into the local option law, occupying a whole chapter in the Code and express and explicit in all of its main provisions, a mandatory and nullifying provision from another chapter, of a character, if it were attempted to apply it to the local option ballot, calculated to enhance the difficulty of voting that already awkward and unsatisfactory ballot, and to increase the danger of defeating the will of the people fairly and intelligently expressed on an important public question—a provision, too, which is wholly inapplicable and unsuited in its language to the use which it is proposed to make of it, and which was designed to apply to a different class of elections in which wholly different ballots are used. If there

were no more than a substantial doubt as to the propriety of such a construction, it would be the duty of the Court to reject that construction, under general principles of law governing the construction of statutes, and that duty would be emphasized by the section of the local option law relating to contested elections where it says: "In judging of such election and return, the court shall proceed on the merits thereof, and decide the same on the constitution and laws, and according to the right of the case."

It is plainly meant by this that the court shall give effect to the will of the electorate if that can be done without violating any plainly essential requirement of the law. Mandatory provisions, having the effect of invalidating important public acts if ignored or overlooked, are not commonly enacted by references to other statutes or left to inference or to be worked out through interpretation; but they are express and explicit, as to their requirements even when not so as to their mandatory character.

If one were to attempt to adopt the provisions of § 122h to the local option ballot, it could not be done without arbitrarily making original law in addition to changing completely the phraseology of the provision, for it can not be said, with any very solid foundation for it, that the whole sentence on the local option ballot is the equivalent of the name of the candidate in the other ballot. In the general election ballot the striking out of a candidate's name is the significant act which shows how the ballot is intended to count, and the designation of the office which is the same for all the candidates, and occurs but once, is left untouched. In the local option ballots the words "For" and "Against" are the significant words, the remaining part of the sentence being the same in both sentences, and the striking out of the "For" or the "Against" shows how the ballot is intended to be counted. In this respect, at least, the words "For" and "Against" on the one ballot, correspond with the name of the candidate on the other, and the remaining words of the sentence, which show the proposition to be voted on, it might well be contended should be taken as the equivalent of the designation of the office to be filled, on the other. But the ballots are not alike and in attempting to adopt § 122h to the local option ballot, it would be necessary arbitrarily, and as a matter of original legislation, to declare how far the erasing line would have to run into the sentence, which might and sometimes does occupy two or more lines on the ballot. If the ballots were alike in form, the difficulty of applying § 122h to the local option ballot would not be so great, but the effect would be, not to make the whole sentence in the one the equivalent of the name in the other, but (certainly if they were both in the form of the general election ballot, and probably if they were both in the form of the local option ballot)

to make the words "For" and "Against" the equivalent of the name. Because, if the local option ballot were conformed to the general election ballot, it would be necessary to put the designation or statement of the proposition to be voted on at the top of the ticket, and there only, and the words "For" and "Against," one under the other, below the statement of the proposition, and the ballot would be marked for voting by cancelling one or the other of those words. If, on the other hand, the general election ballot were conformed to the local option ballot, then there would be no designation of the office to be filled at the head of the ticket, but the designation of the office would follow each name, in which case the name only, under the provisions of § 122h, would be marked out, and on the local option ballot the words "For" and "Against," rather than the whole sentence, would bear the relation to the ballot that the names would bear to the general election ballot, and the remaining portion of the sentence, being the designation or statement of the proposition to be voted on, would correspond with the designation of the office on the regular election ballot. It seems plain that § 122h is not in the nature of things applicable or adaptable to the form or character of the local option ballot as it is prescribed by law, and that, to force an adaptation of it, it would be necessary arbitrarily to change in theory the form of the ballots, one or both, and to declare as an original matter how far the erasing line should run.

While it is a rule for the construction of statutes that the spirit as well as the letter of a statute must be respected, and when the context of the law shows clearly a particular intent in the legislature to effect a certain purpose, some degree of implication may be called to aid the intent, it has been held (Price *v.* Harrison, 31 Gratt. 114, 118) that "there is always danger in giving effect to what is called equity in a statute, it is much safer and better to rely on and abide by the plain words, although the legislature might have provided for other cases had their attention been directed to them;" and "Courts cannot by construction interpolate into statutes words which do not appear there when such interpolation is not plainly deducible from the context or other portions of the act, and when the omission would not render the act incongruous or unintelligible, nor lead to absurd results." Johnson *v.* Barham, 99 Va. 305.

Something was said in the argument to the effect that the requirement of § 122h as to marking has been universally followed in practice in local option elections, and with the construction contended for by petitioners here. I do not know whether this is the case or not. If it be true it is strange no contests have been founded on the mismarking of ballots in this particular, for there

must have been many instances where this rule was not followed, and these elections are often close. In the present case the judges of election acted on the opposite idea, for the ballots were counted as cast.

I am of opinion that Code § 122h, relating to general elections. does not apply of its own force to local option elections; that §§ 146, 581 and 582 of the Code do not by their terms adapt § 122th to govern in local option elections; and that if the terms of §§ 146, 581 and 582 were broad enough to embrace all provisions in the general election law applicable to local option elections, yet § 122h would not apply to local option ballots because its terms and requirements are not in the nature of things applicable to them.

It results as the decision of the Court that the marking of local option ballots need not be done by means of a line drawn three-fourths of the way through one of the sentences.

It has been suggested that, if § 122h does not apply to local option ballots, there is no way indicated by law of marking such ballots. The act, however, provides that the election shall be by ballot and prescribes the form of the ballot. It follows necessarily that one or the other of the sentences must be scratched, and this may be done in any way that clearly shows the intention of the voter to scratch it.

Another ground of objection to the petition, made on the demurrer, is that fifteen of the thirty-one names appended to the contest petition appear as signed by counsel and not by the persons themselves when, as claimed, under the law the petition should have been signed by the parties themselves, and it was stated that if this objection was sustained objections to be supported by evidence would be offered to enough other names to reduce the number of signers below the number required by law to institute a contest. While it is not good practice to offer objections of this sort piece meal, and they should all have been presented at once on a motion to quash the notice, it may be as well to say that I consider the objection a valid one. At page 410, 15 Cyc, referring to contested elections, it is said:

"A complaint or petition in the nature of a pleading" (manifestly referring here to a contest by quo warranto or other proceeding by a claimant to an office to oust an adversary), "may be signed by an attorney the same as any other pleading. But in the case of a statutory petition by electors presented to the Court for the purpose of setting a contest in motion, the signatures must as a rule be affixed by the petitioners themselves, although a petitioner may authorize another to sign his name to the petition if it is done in his presence and by his express direction;

and a petitioner may sign a petition to contest an election by his mark without witnesses."

The principle here stated seems to be sound, and it is supported by citation of a number of decisions by Pennsylvania and New Jersey courts. The law does not encourage such contests to be lightly brought on, and the active personal interest and participation of the requisite number of electors is required to institute a contest. There would be great danger, also, if it were otherwise, that persons urged on by their zeal in a cause, or by a large personal interest in the result of an election, would too readily imply or presume consent to the use of one's name when it was not intended to give such authority. Besides, the electors instituting a contest do not act in their private and individual right merely, in so doing, but in a public character and as quasi representatives of the people and of the State, with the object of having a question as to the action of the people on a public proposition judicially ascertained and determined. The signers of a petition to contest such an election will not be permitted to withdraw their names therefrom after the time for filing such a petition has passed, and thus divest the jurisdiction of the Court, nor, probably, even before such time had elapsed if the withdrawal were likely to have the effect of putting the case out of court. Neither can they as matter of right terminate the case by discontinuance after the lapse of that time, since to permit such rights would put it in the power of designing persons to prevent a contest, when one ought to be made, by making a pretended contest and abandoning it after it became too late for others to take it up, or, though there were no fraudulent motive, might cause a consent to fail which ought to go on, and which other persons would have instituted if it had not been instituted by those who signed the petition. Under general principles of law, persons acting in a representative capacity can not as a rule act through the agency of another or by proxy.

For the reasons just stated, I am inclined to the opinion that cases of this character, which by the terms of the statute are triable by the Court in term, should not be disposed of by a decision by the judge acting in vacation by consent of the formal parties to the proceeding. But since the question in this case seems now to be wholly one of law, I have decided, at the desire of counsel, to announce at this time the decision on the legal question, deferring the formal entry of the decision and the final conclusion of the case until the next term of the court in Page County.

The demurrer to the petition will be sustained on the first ground considered, and the fifteen names appended to the petition

by counsel may be considered as not making such persons parties to the petition.

Note.

The court in this case very wisely calls attention to the danger of departing from what the legislature actually said in favor of a supposed intention of the legislature. That a statute is to be construed according to the intent of the legislature is not a rule of construction at all, but such intent is the object of construction. Where a statute is clear in its term, there is no necessity for construction at all and the legislative intent is of no consequence. It is only in the case where the statute in its wording is not clear that the legislative intent is to be sought for and thus becomes the object of construction. As the law is the will of the legislature and the only act in which that will is spoken is in the act itself, the legislative meaning is to be sought in the words they have used, and if clear the letter of the law controls, unless in exceptional cases where there are cogent reasons for believing that the letter does not fully and accurately disclose the intent or unless to avoid absurd, unjust or inconvenient circumstances.

SUPREME COURT OF APPEALS OF VIRGINIA.

SOUTHERN RY. CO. *v.* RICE'S ADM'X.

June 12, 1913.

[78 S. E. 592.]

1. Negligence (§ 76*)—Contributory Negligence—Violation of Ordinance.—As a general rule a person negligently injured cannot recover if he was at the time of the injury doing some act in violation of a statute or ordinance which contributed to his injury.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 104-107; Dec. Dig. § 76.*]

2. Negligence (§ 119*)—Contributory Negligence—Pleading—Proof.—Contributory negligence may be shown under a plea of not guilty.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 200-216; Dec. Dig. § 119.*]

3. Death (§ 57*)—Contributory Negligence—Pleading—Proof.—Under an allegation of the plea in an action for intestate's negligent death that intestate "was guilty of contributory negligence," defendant could introduce any evidence showing that intestate was per se guilty of contributory negligence or circumstances tending to show contributory negligence.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 74; Dec. Dig. § 57.*]

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.